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itself privileged. It is merely the possession of the attorney that is protected. . . . In such cases, however, it is open to the other party to prove, by any competent evidence, the contents of the paper, because the same are not, in and of themselves privileged. The decisions in this class of cases do not touch the principle that is involved in the matter of confidential communications, whether written or oral, between client and counsel. In the latter instance the privilege attaches to the communication itself. \* \* \* Its competency is not dependent upon the mere manner in which knowledge thereof may be obtained from counsel. The principle forbidding its use is not adopted as a mere rule of professional conduct on the part of the attorney. It confers a right upon the client for his protection and advantage, and which he alone is authorized to waive. \* \* \*

The same reasoning applies with equal, if not greater, force to the communications between husband and wife, upon the inviolacy of which depends that perfect confidence between the twain so necessary to maintain the sacred institution of marriage up to that standard demanded by every well ordered and civilized society." The court then cites *Wilkerson v. State*, 91 Ga. 729; *Bowman v. Patrick*, 32 Fed. Rep. 368; *Mahner v. Linck*, 70 Mo. App. 380; *Mitchell v. Mitchell*, 80 Tex. 101, and *Dreier v. Continental Life Insurance Co.*, 24 Fed. Rep. 670, as having adopted the same conclusion on the same line of reasoning. To these cases should be added the later cases of *Scot v. Com.*, 94 Ky. 511; *Selden v. State*, 74 Wis. 271, and *Lanctot v. State*, 98 Wis. 136, all of which quote *Mercer v. State* with approval and base their decisions on that case.

We are of the opinion that the conclusion reached in the latter cases is based on the better reasoning and that this sort of evidence ought to be rejected.

#### MANDAMUS.

A contrariety of opinion presents itself in the question whether mandamus will lie to compel a corporation to transfer stocks on its books. If corporation stocks are personal property why should not a purchaser of such stocks from another, compel, by mandamus, a transfer on the books of the corporation?

This question lately presented itself before the Supreme Court of New York in the case of *People ex rel., Julius Rothenberg v.*

*Utah Gold & Copper Mines Co.*, 119 N. Y. Supp. 852, where the party defendant appeals from a peremptory mandamus issued to compel it to transfer on its books, stocks purchased by the plaintiff from another party. The plaintiff claims to be the owner of 1,000 shares of stock of the corporation evidenced by the certificates held by him indorsed in blank. He produced his certificates and offered to surrender them, and demanded that such stock be transferred on the books of the corporation to himself. Upon the defendant's refusal, plaintiff obtained a peremptory mandamus compelling the corporation to make such transfer, whereupon defendant appeals.

It must be borne in mind that mandamus is a high prerogative writ, an extraordinary remedy, applied when a party has a right which cannot be enforced in the courts. In fact, mandamus may be termed, "a criminal process relative to civil rights." 3 Brev. (S. C.) 264.

The leading case in this country and one cited most frequently as laying down the rule on this subject is the case of *Shipley v. Mechanic's Bank*, 10 John. (N. Y.) 484, which holds that mandamus will not lie in an ordinary case where a bank refuses to transfer certain shares on its books, when the applicant has an adequate remedy to recover the value of the stock. This decision might be controverted if it could be shown that the question of the transfer of the bank's stock was one of public concern. *People v. Crockett*, 9 Cal. 112. But where it is clear that the public has no interest and that the contending parties have disputed rights and have a clear, adequate remedy by other means, then mandamus will not lie. *People v. Millers*, 39 Hun. (N. Y.) 557; *Currey v. Scott*, 54 Pa. St. 270. Mandamus is "the right arm of the law" with purpose not to investigate and inquire into, but to command and execute. *Townes v. Nichols*, 73 Me. 515.

Several leading cases on this subject hold that where a company refuses a reasonable request to make a proper entry on its books by the transfer of shares, whereby the owner is liable to be deprived of any legal right or pecuniary advantage, the company may be compelled to do its duty by issuance of a writ of mandamus. This principle is sustained in the case of *In re Klaus*, 67 Wis. 401, a railroad case, which holds that the secretary of a corporation may be compelled to transfer shares of stock on its books to the plaintiff. The same doctrine is laid down

in the case of *The Green Turnpike Co. v. Bulla*, 45 Ind. 1, which holds that where the owner of shares of stock in defendant company had demanded a transfer on the books to his own name, which was refused, mandamus may be resorted to, to compel the corporation to make such transfer. The decision of the above cases seem to have been founded upon the fact that the Turnpike and Railroad Cos., though private corporations, serve the public and are of public interest and in their refusal to transfer shares they jeopardize the public's rights. But this theory has been exploded by decisions of more recent judges. The above rule laid down by the courts of Wisconsin and Indiana is further substantiated in the case of *State ex rel., Townsend v. McIver*, 2 S. C. N. S. 25; but this case also lays down the startling assertion that mandamus is the only remedy in such circumstances, for an action against the officers of the corporation is too doubtful and uncertain to insure a complete and full remedy. This principle cannot be supported, for innumerable cases following the English view lay down the rule that an action at law for a conversion of these shares upon the company's refusal to transfer is a proper and expedient remedy. *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90; *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 93.

The English rule is clearly established on this subject, which holds that a court will not grant a mandamus to compel a bank to transfer its stock on its books, for there is a certain and complete remedy obtainable by other actions which are more appropriate for the case. *The King v. Bank of England*, 2 Douglas 526.

Mr. Marshall's text on *Corporations*, p. 851, says that mandamus will not lie against a corporation for its refusal to transfer stock to the plaintiff, because he has an adequate remedy at law for damages, or in equity to compel the corporation to register the transfer. Mr. Cook on *Corporations*, Vol. II, p. 1088, coincides with the above view, stating further, that *assumpsit* is the proper remedy, for the stock of a private corporation has no particular value and may be purchased readily in open market, or freely compensated for in damages.

In Massachusetts the question is presented a little differently, though the same conclusion is reached, in the case of *Stackpole v. Seymour*, 127 Mass. 104, where a purchaser of shares of a railroad corporation sought mandamus. The court held that, as "no

public interest or corporate right is in question," the mandamus must be refused. In Illinois it was held that where it can be shown that the corporation has arbitrarily refused to make such a transfer for no good and sufficient reason, there might be a small ground for a resort to mandamus. *People v. Goss*, 99 Ill. 355. This view was also taken in Georgia in the case of *Bailey v. Strohecker*, 38 Ga. 259, but was later overruled in the case of *The Bank of the State of Georgia v. Harrison*, 66 Ga. 696.

Mandamus is an extraordinary action which can only be invoked when there is a clear and established right to be adjudicated. Why should a person insist upon a writ of mandamus to compel a transfer of stock when an action at law on assumpsit or an action in equity for specific performance accomplishes the desired results? A right of action is not dependent upon the possession of certain shares, but could be enjoyed by a possession of other shares which could be purchased on the market by a recovery of damages equivalent to what the shares would be worth.

Should the aggrieved party think that his action at law would not sufficiently compensate him he may have a sure and complete remedy by then compelling the corporation to register a transfer of the stock and by adjusting the various conflicting rights and claims of the parties. *Rice v. Rockefeller*, 134 N. Y. 174; *Iasagi v. Chicago, B. & Q. Ry.*, 129 Mass. 46.

The better opinion derived from the authorities seems to be that mandamus will not lie to compel a corporation to transfer its stocks, for it is a high prerogative writ, an extraordinary remedy, only invoked when the rights of the parties are clear, precise, and well established. An action at law for damages or a suit in equity for specific performance is the proper remedy.